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MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT, GALLATIN COUNTY

STATE OF MONTANA,	)	Cause No. DC 09-055C
	)	
Plaintiff,	)	
	)	
vs.	)	DEFENDANT'S PRE-SENTENCE
	)	MEMORANDUM
LORA KATHRYN WHITMORE,	)	
	)	
Defendant.	)	
_____	)	

COMES NOW the defendant, Lora Whitmore, by and through her attorney, William A. Bartlett of the Angel, Coil & Bartlett Law Firm, and offers the following considerations at sentencing, herein.

I. PERSONAL INFORMATION:

Lora Whitmore was born in Bozeman, Montana, on the 24<sup>th</sup> day of September, 1978 and is 31 years of age. She has a 29 year old brother and no other siblings. When Lora was thirteen years old her mother earned her Doctorate at Montana State University and the family moved to Las Alamos, New Mexico, where Lora's mother, even to this day, continues her employment in the nuclear fuels accounting and tracing industry.

After high school, Lora worked and attended college as her circumstances and finances

allowed. She attended colleges in New Mexico and California prior to returning to Bozeman in 2006. Lora worked and established residency in Montana for a year, as she had done in California, before enrolling at MSU.

The main purpose in Lora's returning to Bozeman was to be near her grandparents in Butte. Though her grandfather died a year after Lora's return, she remains extremely close to her grandmother and visits her every opportunity she has.

Lora has maintained a 3.0, or above, grade point average at MSU, majoring in Chemical engineering & an Applied Math degree and expects to graduate in 2011-2012. She has paid her own way throughout her schooling and, but for obligations to her mother for legal fees, is debt free. Her assets are limited to personal property.

Lora's sobriety has been documented via the Scream Bracelet that was installed nearly sixteen months ago. She is single, but is in a relationship with a man which is not only comfortable and appropriate, it is serious and definitely presents long term potential.

## II. OFFENSE INFORMATION:

On November 11, 2008, Lora and her passenger were traveling North on Jackrabbit Lane, in Belgrade, Montana at approximately 10:20, p.m. She ~~was traveling the speed limit~~ and was not observed to violate any traffic laws or traffic control devices. Suddenly she and her passenger observed Mrs. Everett, a pedestrian, in Lora's lane of travel where she ~~was struck by~~ the right front of Lora's car and tragically died from the injuries received. 4

~~Jackrabbit Lane~~, according to Belgrade Police Officers testimony, is the busiest street in Belgrade. Mrs. Everett, in a dimly lit section walked from West to East, without the ~~protections~~ of a crosswalk, crossed the Southbound lane and then crossed the turn lane before walking into the North Bound Lane where Lora traveled. ~~In addition to the dark night, the dimly lit street and~~

no cross walk, Mrs. Everett wore dark clothing. Lora would later tell police that Mrs. Everett did not look up; Lora did not even see her face.

Lora's performance on the Field Sobriety Tests indicated that she was not under the influence of alcohol. When asked to provide a breath sample, she refused. When she refused to provide a blood sample, Lora was told she had no choice and Detective Lensing of the Belgrade Police Department took her to Bozeman Deaconess Hospital where Lora's blood was taken from her.

### III. CASE HISTORY:

Lora was charged by Information, filed on the 4th day of March, 2009, with the offense of negligent vehicular homicide while under the influence. The information does not accuse Lora of being under the influence of alcohol or other drug, instead it alleges that she had a blood/alcohol level in excess of .08 and that she negligently caused Mrs. Everett's death.

On the 8<sup>th</sup> day of April, 2009, Lora entered a plea of not guilty to the charge and was released on her own recognizance, subject to conditions of release.

The Court, in its March 3, 2010, ruling on Defense Motions, ordered the suppression of blood test results and statements Lora made to the Belgrade Police. Essentially, the current status of the government's case is this: it cannot prove that Lora's blood alcohol exceeded .08 with the suppression of the blood test results. It cannot convince a jury that Lora was affected by the alcohol she consumed because she so flawlessly performed all the standard field sobriety tests, it cannot prove that she acted negligently because the only witnesses say she was operating her vehicle in a safe manner, within the speed limit.

From the defense perspective the government will have an extremely difficult time convincing the jury that she a) negligently and b) caused Mrs. Everett's death while c) having a

blood alcohol in excess of .08. Nonetheless, proving her innocence at trial will be a very expensive, highly publicized event that does present some risk of conviction, albeit slight in the estimation of counsel.

Given the weak status of the government's case and Lora's diminished financial ability and her diminished will to continue to resist the parties have reached a compromise that satisfies the wishes of the parties. It is a compromise that, under the circumstances, is within the borders of a just result.

#### IV. THE AGREEMENT:

The parties have agreed that the State of Montana will amend the Information to allege a violation of Montana's Criminal Endangerment Statute, §45-5-207, MCA. The allegation in the Amended Information will be that Lora drank alcohol and drove an automobile, from which we conclude that she "knowingly engaged in conduct that created a substantial risk of serious bodily injury or death." Additionally, we have agreed that the imposition of sentence shall be deferred for a period of three years, upon normal terms and conditions, including no alcohol or bars. The proposed agreement is binding upon the Court.

Lora's will to proceed has waned and she believes it is in her best interests to accept the offer of a compromise. The Proposed Amended Information, when considered in conjunction with the previously filed Affidavit of Probable Cause, as instructed in 46-11-201, MCA, sufficient facts are alleged to find probable cause to support the amended charge. Lora and Counsel have discussed all other apparent options, including trial, Motion to Dismiss in the Interest of Justice and for Governmental Misconduct, Motion to Dismiss for Violation of Speedy Trial Rights, and Motion to Reconsider Motion to Dismiss, due to inability of the Government to prove the element in the extant Information that Lora's blood alcohol exceeded .08. Counsel

believes that Ms. Whitmore is well advised and understanding of her jeopardy, risks and options.

While Lora is willing to waive factual and legal defenses to the proposed Amended Information the State of Montana has agreed to recommend a deferred imposition of sentence, even though Lora received a deferred imposition of sentence in the 216<sup>th</sup> District Court, Kerrville, Texas, on the 16<sup>th</sup> day of November, 1998, for felony possession of controlled substances.

Montana's statutes that identifies sentences that may be imposed, §46-18-201, (1), (ii), (b), MCA, states that "... imposition of sentence in a felony case may not be deferred in the case of an offender who has been convicted of a felony on a prior occasion, whether or not the sentence was imposed, imposition of the sentence was deferred, or execution of the sentence was suspended". (Underlining added for emphasis.) **Lora entered a guilty plea but was not convicted**

Under Montana law, a deferred imposition of sentence is not a conviction. See *State vs. Tomaski*, 337 Mont. 130, 157 P.3d 691, 2007 MT 103. Clearly, if Lora's prior deferred imposition of sentence had been revoked, she would be in the status of having a prior "conviction", but such is not the case. §46-18-201, (1) (a), MCA, **refers to a person who "has been found guilty of an offense" as qualifying** for a deferred imposition of sentence. The legislature could have used the "found guilty" language instead of the word "convicted", but it did not. Thus, it can accurately be said, under Montana Law, that Lora was "found guilty" but was not "convicted" and is therefore, not barred from receiving a deferred imposition of sentence, herein.

Additionally, §46-18-222 (3), MCA, authorizes a subsequent deferred imposition of sentence when the defendant acted "under unusual and substantial duress, although not such

duress as would constitute a defense to the prosecution". The State of Montana and Lora Whitmore have stipulated that such duress is sufficient to meet the exception contained in said statute.

V. CONCLUSION

Two centuries ago a Scottish poet observed that "*WHEN ONE HAS BEEN THREATENED WITH A GREAT INJUSTICE ONE ACCEPTS A SMALLER AS A FAVOR.*" It appears likely that plea bargaining has been a tool in the shop of justice for quite some time. The compromise in this case is within the bounds of justice and is one both parties accept and encourage this Honorable Court to concur and bind itself to the resolution that fits the needs and desires of the parties.

Respectfully submitted this 7<sup>th</sup> day of July, 2010.

ANGEL, COIL & BARTLETT LAW FIRM

  
WILLIAM A. BARTLETT

CERTIFICATE OF SERVICE

I hereby certify that on the 7<sup>th</sup> day of July, 2010, a true and correct copy of the foregoing document was served upon counsel by hand delivery as follows:

Gallatin County Attorney  
Scott Lanzon, Deputy  
1709 West College  
Bozeman, MT 99715

  
WILLIAM A. BARTLETT